IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

State of Washington, Respondent, v. Afton MACALL Smith, AKA AFTON MCCALL SMITH, Appellant.	)))))))))))	DIVISION ONE No. 63546-8-1 UNPUBLISHED OPINION FILED: July 6, 2010

Dwyer, C.J. — Afton Smith appeals from the judgment entered on the jury's verdict finding him guilty of domestic violence felony violation of a court order. Finding no error, we affirm.

I

In August 2007, Geraldine Smith[1] obtained a protection order prohibiting Smith (her husband at the time) from contacting her for one year. However, in late 2007, the Smiths resumed living together after Geraldine had unsuccessfully sought termination of the protection order.

The couple's reconciliation was short lived. Early in the morning of June 27, 2008, officers from the Kent Police Department responded to Geraldine's report that Smith had assaulted her. Smith moved out of Geraldine's residence and was subsequently charged by information with one count of domestic violence felony violation of a court order, in violation of RCW 26.50.110(1) and

[1] For clarity, we refer to the appellant by his last name and the complainant by her first name.

(4).

In late August, the Smiths resumed contact. Geraldine subsequently left a voicemail recording via telephone for the prosecutor's office's advocate stating: (1) that prior to June 26 she had convinced Smith that the protection order had been terminated and (2) that no assault had occurred on June 26. Believing her recantation to be a result of Smith's urging, the State amended the charging document to include one count of tampering with a witness – domestic violence, in violation of RCW 9A.72.120.

Prior to trial, the court granted the State's unopposed motion to introduce evidence of prior incidents of domestic violence between Smith and Geraldine for the purpose of demonstrating that Geraldine's putative recantation was insincere. The trial court also issued a jury instruction proposed by Smith's attorney concerning the limited purpose for which the jury could consider the evidence of the prior incidents of domestic violence. This instruction, jury instruction 18, provided: "Evidence has been introduced in this case on the subject of prior incidents between Mr. Smith and Ms. Smith for the limited purpose of the victim's state of mind and her credibility. You must not consider this evidence for any other purpose."

Geraldine testified at trial about prior incidents of domestic violence between her and Smith. During closing argument, the prosecuting attorney referred to the prior incidents of domestic violence between Smith and

Geraldine. Smith objected to the prosecutors comments at the time and takes issue with the comments on appeal.

The jury subsequently convicted Smith of the charge of felony violation of the protection order but acquitted him of the witness tampering charge. Smith appeals.

II

First, Smith contends that he received ineffective assistance of counsel because instruction 18, which his attorney proposed, employed the term "victim."[2] We disagree.

To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). A strong presumption of effective assistance exists, and the defendant bears the burden of demonstrating an absence in the record of a strategic basis for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Prejudice occurs if there is a reasonable probability that the outcome of the proceedings would have been different had counsel's performance not been deficient. McFarland, 127 Wn.2d at 335. Failure to

[2] Prior to trial, the court had granted Smith's motion in limine seeking to limit the prosecutor's ability to refer to Geraldine as "the victim."

establish either prong of the test is fatal to the claim of ineffective assistance of counsel. Strickland, 466 U.S. at 697.

In this case, the wording of instruction 18, in particular the inclusion of the term "victim," closely follows the wording of an instruction approved of by our Supreme Court in State v. Magers, 164 Wn.2d 174, 180, 189 P.3d 126 (2008).[3] The record indicates that Smith's attorney tailored the instruction approved of in Magers to address other issues important to Smith's defense (i.e., removal of the term "defendant"). Counsel would be understandably reluctant to change the wording too much, lest the impact of the Magers decision's approval be diluted.

Smith has failed to demonstrate that his counsel's proposal of the instruction was anything but a strategic decision. Counsel's performance is viewed in the context of the entire trial. McFarland, 127 Wn.2d at 335 (citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). Proposing an instruction approved of by our Supreme Court is not an act falling below the standard of care for an attorney. State v. Gallagher, 112 Wn. App. 601, 617, 51 P.3d 100 (2002). Therefore, Smith has failed to establish that his counsel's performance was deficient. Having failed to so establish, Smith's claim fails. Strickland, 466 U.S. at 697.

III

Next, Smith contends that instruction 18 constituted an impermissible

[3] Our Supreme Court approved of the following instruction: "Evidence has been introduced in this case on the subject of the defendant's prior bad acts for the limited purpose of the victim's state of mind and her credibility. You must not consider this evidence for any other purpose." Magers, 164 Wn.2d at 180.

judicial comment on the evidence because of its reference to Geraldine as "the victim." However, because Smith's attorney proposed this instruction, any error was invited and cannot afford a basis for appellate relief.

The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. State v.Carter, 127 Wn. App. 713, 716, 112 P.3d 561 (2005) (citing State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999)). The invited error doctrine precludes appellate review even where constitutional rights are involved. State v. Alger, 31 Wn. App. 244, 249, 640 P.2d 44 (1982) (citing State v. Lewis, 15 Wn. App. 172, 176-77, 548 P.2d 587 (1976)).

Smith proposed the instruction to which he now assigns error. His claim fails.

IV

Next, Smith contends that the prosecuting attorney engaged in misconduct during her closing argument by arguing that Smith had a propensity to commit certain crimes. However, Smith failed to preserve this issue for appellate review as he failed to lodge a proper objection.

Appellate review is precluded when error is assigned on grounds different from those upon which an objection was interposed at trial. Stenson, 132 Wn.2d at 726-27; RAP 2.5(a); see ER 103(a)(1). To preserve an issue for review, "an objection must be sufficiently specific to inform the trial court and

opposing counsel of the basis for the objection and to thereby give them an opportunity to correct the alleged error." State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993). With regard to closing argument, when a defendant fails to so object, the claim of error is waived unless the alleged misconduct was "so flagrant and ill intentioned" that it caused prejudice that could not have been cured by further instruction from the trial court. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). However, appellate review is not precluded when interposing an objection would have constituted a "useless endeavor" because an earlier objection, interposed on the same ground, had been overruled. State v. Cantabrana, 83 Wn. App. 204, 208-209, 921 P.2d 572 (1996).

During closing argument, the prosecutor made reference to prior incidents of domestic violence between Smith and Geraldine to explain her putative recantation. During these comments, Smith interposed the following objection: "Your Honor, we are going to object. This information is only offered to judge the credibility of the alleged victim in this case, not offered about the credibility of Mr. Smith." Thus, the objection was that the prosecutor was arguing as to Smith's credibility. On appeal, Smith contends that the prosecutor engaged in misconduct by arguing that Smith had a propensity to commit certain crimes. Because Smith objected on a ground different from that which he complains of on appeal, this claim is precluded from appellate review. Stenson, 132 Wn.2d at 726-27.

In addition, Smith makes the same claim as to other statements made by the prosecutor during closing argument but to which he failed to object. Because Smith failed to interpose an objection at trial he cannot raise this issue on appeal. Padilla, 69 Wn. App. at 300. Contrary to Smith's contention, such an objection would not have been a "useless endeavor." See Catabrana, 83 Wn. App. at 208-209. As explained above, Smith's previous objection was not interposed on the same basis as the error now assigned on appeal. Therefore, to preserve the claim for appellate review, a specific objection was necessary. Padilla, 69 Wn. App. at 300.

In the absence of a proper objection interposed at trial, we review allegations of prosecutorial misconduct only where the challenged arguments were so flagrant and ill intentioned that a proper curative instruction could not have ameliorated any resulting prejudice. Russell, 125 Wn.2d at 86. Here, Smith has not demonstrated that a curative instruction would have been ineffective. Therefore, appellate relief is not warranted.

V

Finally, Smith contends that all of the assignments of error that he has raised on appeal constitute cumulative error, entitling him to a new trial. Smith, having failed to establish that any prejudicial error occurred, has also failed to satisfy his burden of demonstrating the existence of cumulative error warranting reversal. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835

(1994).

Affirmed.

Dwyer, C.J.

We concur:

Spearman, J.

Becker, J.